Petition

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ALEXANDER L. STEVAS,
CLERK

No. 81-660

In the Supreme Court of the United States

October Term, 1981

ADDISON SAVMOR, INC.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

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Marion Bldg.
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October 1, 1981

QUESTIONS PRESENTED

1. Whether the District Court erred in remanding this case to the agency for reconsideration of its decision disqualifying Plaintiff-Appellee from participation in the Food Stamp Program in light of new regulations, effective January 1, 1979, promulgated under the Food Stamp Act of 1977, which regulations were in effect at the time of the Court's decision but not at the time of the administrative action? The Court of Appeals for the Sixth Circuit said it did.

2. Does the District Court have authority to remand to the administrative agency for reconsideration in light of new regulations and 7 U.S.C. §2023 when it expresses no opinion as to the parameters of such reconsideration?

II

LIST OF ALL PARTIES

Parties Petitioner:

Addison Savmor, Inc. *

Parties Respondent:

United States of America

*Addison Savmor, Inc. has no parent companies, subisdiaries, or affiliates.

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No.

In the Supreme Court of the United States

October Term, 1981

ADDISON SAVMOR, INC.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

The Petitioner, Addison Savmor, Inc. respectfully asks that a Writ of Certiorari issue to review the final opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 8, 1981. Rehearing was denied on July 31, 1981, which action overruled and denied Pet-

itioner's Petition for Rehearing En Banc of the Court's decision entered June 8, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not reported as of this date; the District Court for the Northern District of Ohio's opinions are unreported. All opinions appear in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on June 8, 1981. A timely Petition for Rehearing En Banc was denied on July 31, 1981, and this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 7 §2011, et seq:

The Food Stamp Act of 1964 and its various amendments until the effective date of 7 U.S.C. §2023, the Food Stamp Act of 1977. (Effective October 11, 1979) (promulgated January 1, 1979). (The above provisions deemed pertinent are set out in detail in the appendix of this petition.)

STATEMENT OF THE CASE

Addison Savmor, Inc. is a retail grocery store in the city which carries a full line of grocery items, and has a gross income in excess of five million dollars. It was authorized on November 18, 1974, by the Department of Agriculture, Food and Nutrition Service (FNS) to be a participant in the Food Stamp Program.

As a result of an investigation, the Department charged Addison Savmor with violations of the Food Stamp Act, 7 U.S.C. §2011 et seq., and the regulations promulgated pursuant thereto. Addison, was afforded the opportunity to and did reply to the charges. Subsequently a letter of disqualification for a period of three years was issued. On July 25, 1978, attorney for the owner orally presented further arguments in favor of his client to the Food Stamp Review Officer. The

Review Officer concluded, however, the initial charges and the three year disqualification from the Food Stamp Program was appropriate.

Thereafter, counsel for Addison Savmor filed a complaint in the Cuyahoga Common Pleas Court, a "court of record of the State having competent jurisdiction," seeking judicial review of the determination made by the Secretary pursuant to 7 U.S.C. §2022. The United States timely removed the action pursuant to 28 U.S.C. 1414.

The U.S. District Court conducted a trial de novo in the within case beginning August 26, 1979, and continuing for a period of five days. The Court concluded that Addison had committed violations of the Act and, therefore, affirmed the Administrative findings.

After deciding the merits of the

case favorable to defendant, United States, the court noted in its order that it had no authority to review the sanction, a three year period of disqualification. Nevertheless, the court remanded the case to the agency for reconsideration of the sanction in light of a new provision of the Food Stamp Act of 1977. This new provision of the Act allows the Secretary, if he finds a retail or wholesale store who is a participant in the Food Stamp Program to be in violation provisions of the Food Stamp Act and its regulations, to impose a civil monetary penalty for violations if the Secretary determines that the store's disqualification would cause hardship to food stamp recipients.

Prior to the passage of this provision, the Food Stamp Act and its regulations did not provide for the possibility

of a monetary penalty upon the Secretary's finding of a violation, only disqualification of the participant store for varying periods of time, depending on the nature and frequency of the violation. 7 C.F.R. 272.6 (a).

The regulations implementing the 1977 Act became effective January 1, 1978 --three months after the final administrative decision in this case, but prior to the trial in the District Court. The court recognized that both the violations and the administrative action preceded that change in regulations, but reasoned that,

> It is fundamental jurisprudence that a case should be decided under the law effective at the time of decision, except in criminal situations where imposition of a harsher penalty would result in a denial of due process is applied retroactively. Moreover, plaintiff should not be penalized because the Department was unable to draft its regulations until more than a year after the effective date of the 1977 amendments.(App. 9-10).

The court was careful not to express an opinion about the proper decision as to sanctions on remand, thus leaving the agency free to reinstate its order of disqualification. Indeed, the court stated that it would not undertake any further review of the agency's decision on remand as long as that decision is within the parameters of the new regulation. (App. 10)

The United States appealed from that portion of the Court's order remanding the case in regard to sanctions back to the Agency for reconsideration in light of the new regulations mentioned above.

REASONS FOR GRANTING THE WRIT

Plaintiff-Appellee would indicate to the Court that the United States of America has cited a total of fifteen cases as authorization for its position in this matter. It is to be noted that not one of these cases considered the question with which we are involved in the instant cause.

Nowhere is the Food Stamp Act of 1977 (effective 1-1-79) even considered in any of the offenses cited by the government. Indeed the act was not in existence at the time of any of these decisions.

Further, a decision of this Court Martin v. United States, 459 F. 2d 300 (6th Cir. 1972) upon which the government has relied so heavily, did not even have the benefit of the legislative intent embodied in the 1977 Food Stamp Act at the time of its decision.

The Food Stamp Act of 1964 provided penalty provisions for various violations of the Act. The pertinent provisions are embodied under Title 7, §2022 of the U.S. Code. (Regulations -7 CFR 270-274).

The 1964 Act did not provide for any type penalty other than "Any authorized retail food store . . . may be disqualified from further participation in the program by F.N.S. for a reasonable period of time, not to exceed 3 years, as F.N.S. may determine, if such firm fails to comply with the Food Stamp Act of the provisions of this part . . . ." (7CFR 272.6).

There was no provision other than suspension from the program for days -- up to 3 years. After several years, the Congress recognized that a suspension for any considerable length -- even 30 days, could be catastrophic to the participant.

(See Cross v. U.S., 512 F. 2d 1212, 1975). Realizing that some stores whose gross volume indicated 50%, 60%, even 80%, business in food stamps, could not avoid bankruptcy when any substantial suspension was imposed, they found an alternative.

The Food Stamp Act of 1977 provided new informal guidelines for the hearing officer when making a determination as to the severity of the violations. (F.S.A. 1977. Title 7, §2022). Further, it provided the administrative body with a penalty alternative. The officer could impose a monetary fine of up to $5,000 for each violation. A considerable change from the 1964 penalty provision. It is the contention of appellant that he should at least be accorded the opportunity to have the administrative officer consider the alternative when imposing a penalty. Although, strictly speaking, the action

here is civil, it would appear from the manner in which it is administered, that it is at least quasi-criminal, the participant has an equitable right in being at least considered for a lesser penalty. Further, it is the contention of the appellee that the manner in which the review at the administrative level was conducted transgressed those guidelines as set out in the Food Stamp Act of 1977 and recent court decisions.

The Martin Case (supra) should not be the governing factor in the Addison situation. Not only is it pre-1977 Stamp Act, but it can be differentiated in a number of ways. In Martin, at page 301, Judge Weick, speaking for the majority of two, (Judge Edwards Dissented) said;

> "Thus we have a clear case of admitted violations and sanctions imposed by the Secretary well within the range of his authority, expressly conferred on him by statute and regulation."

Thus it is obvious that there are two

basic differences between Addison and Martin. Aside from the existence of the new Stamp Act, in Addison, no violations were admitted and more importantly, there was no finding that the review officer imposed a sanction within the range of his authority. Obviously, Judge Lambros questioned the penalty imposed, otherwise, why would he ask the review officer to reconsider the penalty? The Court did not attempt to alter or modify -- it merely asked the administrative body to reconsider.

Under the circumstances, the question must be asked, does the government have an appealable issue? Does not Judge Lambros have the jurisdiction to request of an administrative body that it review certain aspects of its findings? If he does, then the government's appeal should be dismissed. It would appear that the District Court, in the interests of fairness, may make this request at anytime.

The Court, in the case of Wolffe v. U.S. Dept. of Agriculture, (455 F. Supp. 169; 1978) initiated a new and very relevant decision so far as review of an administrative decision is concerned. The Court, in confining its remarks solely to the penalty of the review officer, said:

> "The penalty was in excess of Departments own informal guidelines. The Department abused its discretion and acted in an arbitrary and capricious manner."

It appears that this case has forged a bridge between the decisions which had separated Cross v. U.S., supra, and the judicial forces of Martin v. U.S., (459 F. 2d 300; 1971).

Prior to Wolffe, (supra), the "arbitrary and capricious" standard had been applied solely to the findings relevant to the violations themselves. Wolffe has taken the position that even though the administrative body has, in

fact, found that the violations did occur, the severity of the penalty, in itself, may fall within the "arbitrary and capricious" standard and the penalty should be reduced accordingly. The Court, in conclusion stated:

> ". . . . it must be concluded that the Department abused its discretion and acted in an arbitrary and capricious manner. The one year suspension imposed is severe on its face. It exceeds most of the other penalties imposed in this area, even those given for serious violations. Further, it is in excess of the Department's own informal guidelines." (Wolffe, supra, p. 172).

Appellee would call attention to the following cases, all of which substantiate the claim that the penalty in this case is too severe. The allegation is based not only on these cases, but on the intent of Congress in passing the Food Stamp Act of 1977.

Congress, in passing the Act calling for Civil Money penalties said:

> Any approved retail food store or wholesale food concern may be disqualified for a specified period of time from further participation in the food stamp program, or subjected to a civil money penalty of up to $5,000 for each violation if the Secretary determines that its disqualification would cause hardship to food stamp households on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter or the regulations issued pursuant to this chapter. 7 U.S.C. §2021.

The uncontroverted testimony at the trial from both government and Addison witnesses was that the surrounding households would suffer severe hardship if Addison were to go out of business. Further testimony indicated the business could not endure more than a few months without food stamps.

CONCLUSION

The Sixth Circuit Court of Appeals in its order cites the case of Kulkin v. Bergland, 626 F. 2d 181 (1st Cir. 1980) as authority for its decision. Counsel for Addison suggests that the case should not be contrasted with the case at hand. Kulkin, supra, was a summary judgment with no dispute as to material facts and no denial as to violations - clearly there was no genuine issue for trial. The Court said clearly there was no genuine issue for trial. The Court said that were it to review the sentence, it would not disturb it.

Clearly Addison falls within the new guidelines under the 1977 Food Stamp Act. (See Kulkin, supra, p. 10 full). Counsel for Appellee would also direct the Court's attention to the case of Jedatt v. U.S.D.A. 488 F. Supp. 261-(E.D. Mich. 1980) a

District Court decision within the 6th Circuit boundaries which clearly is contrary to Kulkin. In that case the Court wanted the agency to indicate why a fine should not be imposed despite pre-act violation. I submit that Judge Lambros, in this case did not go that far. In fact, if one reads the language used, he must clearly conclude that the Judge felt he could not go that far.

Does not a District Judge have authority to request of an administrative agency that it review its decision while expressing specifically no opinion as to the parameters of such reconsideration?

Appellee would indicate to the Court that it could well have been the intention of Judge Lambros to have the decision reviewed regardless of whether a new penalty would be imposed under the new act. Could he not request of the review off-

icer that in light of new guidelines and decisions that the review officer take another look at the penalty? The Court, in what clearly distinguished its opinion from Kulkin says at page 4, "However the Court expresses no opinion as to the parameters of such reconsideration, for it is foreclosed from such expressions." The entire tenor of the decision indicates that the Court felt it was bound by the Martin Case, supra.

However, the Court (Judge Lambros' opinion in the Addison Case) does not take the position that the Sixth Circuit Court assumed in Green v. Cashman, 605 F. 2d 945 (6th Cir. 1979). In that case this Court held that the nursing home operator was entitled to the benefit of regulations which were not in existence when the trial was conducted in the District Court. In oral argument on June 1, 1981 the Sixth Circuit Court

distinguished Cashman, supra from the case at hand by indicating that it felt the 1977 act specifically denied appellee the benefit of its provisions. Counsel disagrees. Counsel for appellee does not believe that the language indicating violators under the 1964 act cannot avail themselves of the benefits of the new act is iron clad. The reasons given for this provision, were, it felt, it was necessary so that the Secretary could carry out its job in an orderly and expeditious manner. Counsel suggests that in reality, allowing the operator of a store the benefits of the new act cannot interfere with the implementation of the 1977 Food Stamp Act.

Further, Counsel suggests that it would appear to be against public policy to implement this provision in an iron clad fashion. It is basic jurisprudence

that a case should be decided under laws that exist at the time of decision.

In conclusion, appellee would suggest to the Court that another question presented itself - Should the District Judge be foreclosed from ever remanding a case to the agency to review its penalty even when he specifically indicates he cannot control the parameters of the agency's decision?

Had Judge Lambros omitted any reference to the new 1977 Food Stamp Act and merely indicated that in light of evidence produced at a five (5) day trial that was not available to the hearing officer, that the officer take a second look at the penalty, would he be prohibited from remand on this basis?

Counsel, in light of the seriousness of all of the above questions, requests that a Writ of Certiorari should

issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

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October 1, 1981

APPENDIX

FINDINGS OF FACT, CONCLUSION OF LAW

AND ORDER OF THE

UNITED STATES DISTRICT COURT

(Filed June 4, 1979)

No. C 78-1374

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

ADDISON SAVMOR, INC.

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

LAMBROS, District Judge

This action was brought by plaintiff under former 7 U.S.C. §2022 (now 1023) to obtain a de novo trial following the Department of Agriculture's determination that plaintiff was in violation of the re-

requirements of the Department's Food Stamp Program. Plaintiff also sought review and modification of the resulting sanction of a three-year period of disqualification from participation in the program. The Court held a five-day trial at which the government was required to present its entire case against plaintiff, and plaintiff was given a full opportunity to cross-examine all witnesses and present any relevant evidence on its own behalf. See Saunders v. United States, 507 F. 2d 33, 36 (6th Cir. 1974). At the conclusion of those proceedings the Court entered its oral opinion affirming the findings of violation, but remanding the case to the Department of Agriculture for reconsideration of the maximum disqualification penalty. This opinion and order is intended merely to summarize that determination, and to

provide a written foundation for appellate review, if any. Cf. Rule 52 (a), Fed. R. Civ. P.

Upon review of all the evidence, the conclusion is inescapable that plaintiff, over a period of almost two years, engaged in a course of conduct flagrantly in violation of the terms and conditions of the Food Stamp Program. Employees and officers of plaintiff continuously and without encouragement allowed the Department's investigators to purchase various obviously ineligible items, returned cash as change in numerous transactions, and, most importantly, unabashedly exchanged coupons for cash at roughly 60% of their face value. The Court finds as fact that purchases of ineligible items took place on the following dates; April 9, 1975; April 10, 1975; April 15, 1975; April 18, 1975; February 7, 1977; and March 17, 1977. The Court also

finds that plaintiff, through its employees, officers and/or agents, redeemed and discounted food stamps for cash on the following dates: April 9, 1975; April 10, 1975; April 18, 1975; May 1, 1975; February 7, 1977; and February 24, 1977. The May 1, 1975, transaction involved the exchange of $1,030 worth of coupons for $515 in cash.

Although plaintiff did attempt to argue that at least some of these transactions amounted to "entrapment", it cannot really be inferred from the evidence here that the department's investigators actively solicited the violations, or that their own conduct was anything but proper. Cf. Wolffe v. United States, 455 Supp. 169, 171 (E.D. Mo. 1978). Plaintiff did argue much more emphatically, and much of its evidence was so intended, that the specific employee or officer charged by the Depart-

ment with the violation was in fact not involved in that transaction. On the whole, it must be said that the Department's investigators were reasonably accurate in their identification of the persons making the sales or exchanging the coupons. In any event, explicit identification of individual em ployees is unnecessary in a case such as this, where it is the corporate entity that is actaully charged with violations of the Food Stamp Program. See, e.g. J.C.B. Supermarkets, Inc. v. United States, 530 F. 2d 1119, 1122 (2d Cir. 1976). Plaintiff is liable for the violations on a theory of respondeat superior.

Having affirmed the Department's findings of violations, it is the considered law of this Circuit that the Court has no power to review the sanction of maximum disqualification imposed on plaintiff. Martin v. United States, 459 F. 2d 300 (6th Cir.). See also Nowicki v. United States, 536 F.

2d 1171 (7th Cir. 1976). Other circuits have taken a contrary view, see Goodman v. United States, 518 F. 2d 505 (5th Cir. 1975); Cross v. United States, 512 F. 2d 1212 (4th Cir. 1975) (Cross I), but Congress has explicitly rejected that view in its recent 1977 amendments to the Act. Food and Agricultute Act of 1977, P.L. 95-113. See House Report No. 95-345., Comm. on Agriculture, at 397-98; 19-7 U.S. Code, Cong. & Admin., News 22, 26-27. However, in those same amendments the Congress changed the enforcement procedures so that, in addition to periods of disqualification, fines of up to $5,000 per violation could be imposed instead "if the Secretary determines that its [the retailer's] disqualification would cause hardship to Food Stamp households.." 7 U.S.C. §2023, eff. Oct. 1, 1977. Moreover Congress stated that this

> alternative punishment to outright program disqualification or suspension[was] one that should normally be implosed instead of disqualification. This would benefit all three major participants in the program--consumers, business and the Department itself. Consumers would not lose the convenience of nearby stores during a period of suspension.

House Report No. 95-345, supra at 397; 1977 U.S. Code, Cong.& Admin., News at 2326. (emphasis supplied).

The Department of Agriculture's new regulations under 7 U.S.C. §2023, however, were not promulgated or effective until after this case had left the administrative level. Further, it is the Department's position that because the conduct here occurred before the effective date of the 1977 amendments, plaintiff cannot be considered under the more lenient fine provisions. The Court disagrees. It is fundamental jurisprudence that a case should be decided under the law effective at the time of decision, except in

criminal situations where impositions of a harsher penalty would result in a denial of due process if imposed retroactively. However, that is not this case, where plaintiff might be entitled to more favorable treatment because of a change in the law. Moreover, plaintiff should not be penalized because the Department was unable to draft and enact its regulations until more than a year after the effective date of the 1977 amendments. The Court therefore concludes that plaintiff is entitled to reconsideration by the Department of the sanction imposed here, under the new regulations and 7 U.S.C. §2023, and in light of the congressional policy expressed above.

However, the Court expresses no opinion as to the parameters of such reconsideration, for it is foreclosed from such expressions. Nor will the Court entertain any further review of the Depart-

ment's decision after remand, so long as that decision is within the guidelines of and authorized by the new regulations. Even the Fourth Circuit has abandoned its earlier position and now holds that a penalty within the guidelines is not reviewable, even if thought to be unreasonable in a specific case. See Cross v. United States, 538 F. 2d 624 (4th Cir.) 1976 (Cross II); Herling's Grocery Basket, Inc. v. United States, 538 F. 2d 86 (4th Cir. 1976). See also Kogan v. United States, 426 F. Supp. 1064 (E.D. Mo 1977). Accordingly the Court will affirm the findings of violation but remant the case for the limited purpose stated herein. As this is the final action of this Court, any desired appeal must be taken from this order, as there will be no further review in this Court.

IT IS SO ORDERED

/s/ THOMAS D. LAMBROS
United States District Judge

JUDGMENT OF THE UNITED STATES

DISTRICT COURT

(Filed June 4, 1981)

No. C 78-1374

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

ADDISON SAVMOR, INC.,

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

LAMBROS, District Judge

In accordance with the accompanying Findings of Fact, Conclusions of Law and Order, the final decision of the Departmant of Agriculture finding Addison Savmor, Inc., in violation of the terms and conditions of the Food Stamp Program is hereby affirmed. The case is remanded

to the Department for further proceedings consistent with that Order.

This action is terminated.

IT IS SO ORDERED

/s/ THOMAS D. LAMBROS

United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 8, 1981)

No. 79-3485

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ADDISON SAVMOR, INC.

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA

Defendant-Appellees.

BEFORE: EDWARDS, Chief Judge; LIVELY Circuit Judge; and PECK, Senior Circûit Judge.

The government appeals from the judgment of the district court remanding this case to the Secretary of agriculture for a reconsideration of the administrative sanction (a three year disqualification) imposed by the Secretary for violations

of the Food Stamp Act. The district court found that serious violations had occurred and recognized that it lacked authority to review the sanction. However, it based the remand on the fact that a new provision contained in the 1977 Food Stamp Act permits the Secretary to impose a civil monetary penalty if he determines that his qualification of a store in violation of the Act would cause hardship to food stamp recipients. The government maintains that the administrative decision was made prior to the effective date of the 1977 Act and that the district court should have decided the case on the provisions of the 1964 Act in effect at the time of the administrative decision and that the regulations in effect at that time should control.

The plaintiff-appellee argues that it should be accorded an opportunity to have an administrative officer consider

the alternative penalty provisions contained in the 1977 Act which was in effect at the time of the district court's review. The court notes that the 1977 Act specifically provides that pending proceedings shall be disposed of pursuant to the 1964 Act and that regulations pursuant to that Act are to govern until such time as new regulations are promulgated pursuant to the 1977 Act.

Upon consideration of the briefs and oral arguments together with the record on appeal the court concludes that the district court erred in remanding this case to the Secretary of Agriculture. The provision for a civil monetary penalty was not applicable to the plaintiff whose violations occurred prior to the effective date of the 1977 amendment. Kulkin v. Bergland, 626 F. 2d 181, 187 (1st Circuit 1980).

The judgment of the district court is reversed and the cause is remanded for entry of a judgment affirming the decision of the Secretary of Agriculture.

ENTERED BY ORDER OF THE COURT

/s/ JOHN A. HEHMAN, Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING MOTION FOR REHEARING

(Filed June 8, 1981)

No. 79-3485

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ADDISON SAVMOR, INC.

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA

Defendant-Appellees.

BEFORE: EDWARDS, Chief Judge; LIVELY Circuit Judge; and PECK, Senior Circuit Judge.

No judge in active service on the court having requested rehearing en banc, the petition for rehearing has been referred to the hearing panel. Upon consideration, the court concludes that

the issues raised in the petition for rehearing were fully considered upon the original submission and decision of this case.

The petition for rehearing is denied.

ENTERED BY PETITION OF THE COURT

/s/ LEONARD GREEN

Chief Deputy Clerk

UNITED STATES CODE

7 U.S.C. 2021 (1977 Food Stamp Act) Civil money penalties and disqualification of retail food stores and wholesale food concerns.

Any approved retail food store or wholesale food concern may be disqualified for a specified period of time from further participation in the food stamp program, or subjected to a civil money penalty of up to $5,000 for each violation if the Secretary determines that its disqualification would cause hardship to food stamp households on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter or the regulations issued pursuant to this chapter. Such disqualification shall be for such a period of time as may be determined in accordance with regulations issued pursuant to this chapter. The action of

disqualification of the imposition of a civil money pnealty shall be subject to review as provided in Section 2023 of this title.

7 U.S.C. 2011 Regulation 272.6 — Disqualification of retail food stores, meal services, and wholesale food concerns.

(a) Any authorized retail food store, authorized meal service, or authorized qholesale food concern may be disqualified from further participation in the program by F.N.S. for a reasonable period of time, not to exceed 3 years, as FNS may determine, if such firm fails to comply with the Food Stamp Act or the provisions of this part; except that, if the disqualification may be continued until such claim is paid. Any firm which has been so disqualified and which desires to be reinstated upon the end of the period of disqualification or at any time

thereafter shall file a new application so that FNS may determine whether reinstatement is appropriate under the provisions of this part. Such an application may be filed starting 10 days before the end of the period of disqualification.

Opposition

Office-Supreme Court, U.S.
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DEC - 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-660

In the Supreme Court of the United States

OCTOBER TERM, 1981

ADDISON SAVMOR, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Martin v. *United States*, 459 F. 2d 300 2

Statutes and regulations:

Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, 7 U.S.C. 2011 *et seq.* 1, 4

7 U.S.C. 2017 2

7 U.S.C. 2022 2

Food Stamp Act of 1977, 7 U.S.C. (Supp. IV) 2011 *et seq.*:

7 U.S.C. (Supp. IV) 2021 1

7 U.S.C. (Supp. IV) 2011 note 4

7 C.F.R.:

Section 272.2(b) 2
Section 272.2(c) 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-660

ADDISON SAVMOR, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues that the court of appeals erred in not requiring the Secretary of Agriculture to reconsider the disqualification sanction he imposed upon it for violations of the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, in light of a provision in the Food Stamp Act of 1977, 7 U.S.C. (Supp. IV) 2021, that was adopted after the violations in this case and that allows the Secretary to impose a civil penalty of up to $5,000 in lieu of disqualification.

1. The Food Stamp Program, enacted as part of the Food Stamp Act of 1964, 7 U.S.C. 2011 *et seq.*, allows eligible households to purchase food stamps from the Department of Agriculture at a discount from the face value of the stamps. The stamps then can be used to purchase food items at retail grocery stores that are authorized by the

Secretary of Agriculture to participate in the program. 7 U.S.C. 2017. Participating grocery stores, however, are not allowed to exchange non-food items for food stamps or to give money as change for food stamp purchases. 7 C.F.R. 272.2(b) and (c). Violations of these regulations were punishable under the 1964 Act only by disqualification from the program for reasonable periods of up to three years.

Petitioner, a retail grocery store in Cleveland, Ohio, was authorized by the Secretary in 1974 to be a participant in the Program (Pet. 3). After an investigation, petitioner was charged with 22 violations of the regulations occurring between April 1975 and March 1977 (Pet. App. A2). On September 25, 1978, a Food Stamp Review Officer determined that petitioner had violated the regulations of the Food Stamp Program and that petitioner should be disqualified from participation in the program for three years (Pet. 3).

Petitioner filed suit in the United States District Court for the Northern District of Ohio under 7 U.S.C. 2022, challenging the determination that violations had occurred and seeking review of the sanction imposed. After a trial de novo, the district court held: "[T]he conclusion is inescapable that plaintiff, over a period of almost two years, engaged in a course of conduct flagrantly in violation of the terms and conditions of the Food Stamp Program" (Pet. App. A2). The court then determined that, in light of *Martin* v. *United States*, 459 F. 2d 300 (6th Cir. 1972), it had no power to review the administrative sanction imposed on petitioner (Pet. App. A3). The court, however, remanded the case to the Secretary to reconsider the sanction in light of a new provision of the Food Stamp Act of 1977, 7 U.S.C. (Supp. IV) 2021 (Pet. App. A5), that had gone into effect on October 1, 1977, after petitioners' violations had occurred, and that had been implemented through regulations of the Department on January 1, 1979, after the sanction in this

case had been imposed. The provision permits a civil monetary penalty to be imposed instead of disqualification, if the Secretary determines that the store's disqualification would cause hardship to food stamp recipients.

The United States appealed and the court of appeals reversed.[1] The court held that "[t]he provision for a civil monetary penalty was not applicable to the plaintiff whose violations occurred prior to the effective date of the 1977 amendment" to the Food Stamp Act (Pet. App. A8).

2. Petitioner argues (Pet. 11-13) that, even though the Food Stamp Act of 1977 appears not to apply to its case, the remand order was still a proper exercise of the district court's discretion. The court of appeals, however, correctly held that the 1977 statute plainly was intended to apply prospectively only. The new Act provides:

> (a) The Secretary of Agriculture shall implement the Food Stamp Act of 1977 as expeditiously as possible consistent with the efficient and effective administration of the food stamp program. The provisions of the Food Stamp Act of 1964, as amended, which are relevant to current regulations of the Secretary governing the food stamp program, shall remain in effect until such regulations are revoked, superseded, amended, or modified by regulations issued pursuant to the Food Stamp Act of 1977. * * *
>
> (b) Pending proceedings under the Food Stamp Act of 1964, as amended, shall not be abated by reason of any provision of the Food Stamp Act of 1977, but shall be disposed of pursuant to the applicable provisions of

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[1] Petitioner did not cross-appeal on the issues of whether the evidence supported a finding that the violations had occurred or whether the district court had power to review the disqualification sanction imposed by the Secretary.

the Food Stamp Act of 1964, as amended, in effect prior to the effective date of the Food Stamp Act of 1977.

* * * * *

7 U.S.C. (Supp. IV) 2011 note.

Congress thus expressed with unmistakable clarity its intention that proceedings pending before the agency at the time of the 1977 amendments should be disposed of pursuant to the Food Stamp Act of 1964 until regulations pursuant to the 1977 Act were issued. The instant case was pending at the agency level before the effective date of those amendments. The court of appeals therefore properly declined to allow petitioner the benefit of the new Act. This interpretation, which is of no prospective importance, is consistent with the only other reported cases on the issue. See *Kulkin* v. *Bergland*, 626 F. 2d 181 (1st Cir. 1980); *Cass Corridor Food Coop* v. *United States*, 512 F. Supp. 925 (E.D. Mich. 1981).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

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[2]The case of *Jedatt* v. *United States Department of Agriculture*, 488 F. Supp. 261 (E.D. Mich. 1980), relied on by petitioner (Pet. 11), is not applicable here. The final administrative determination in *Jedatt* occurred in February 1979, after the January 1, 1979 effective date of the new regulations under the 1977 Act.